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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1666

ARIZONA PUBLIC SERVICE COMPANY, ET AL.

v.

CHEMEHUEVI TRIBE, ET AL.

No. 73-1667

FEDERAL POWER COMMISSION

v.

CHEMEHUEVI TRIBE, ET AL.

BRIEF OF AMERICAN PUBLIC POWER ASSOCIATION AMICUS CURIAE

FRANK WILLIAM FRISK, JR.
Attorney for
American Public Power Association
Suite 212
2600 Virginia Ave., N.W.
Washington, D.C. 20037

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The American Public Power Association (APPA) supports the arguments made in the briefs of the Solicitor General and the Arizona Public Service Company, et al.

APPA has received the consent of counsel for all parties to file this brief amicus curiae in accordance with Rule 42 of this Court.

INTEREST OF THE AMICUS CURIAE

The American Public Power Association is composed of some 1,400 consumer-owned electric utilities in 48 states, Puerto Rico, American Samoa, the Virgin Islands, and Guam. The members are State power authorities, public utility districts, cooperatives, but primarily municipalities. The municipally owned and operated utilities, divisions of city governments, range in size from the Cities of Los Angeles, Seattle and Jacksonville, Florida, to small villages like Elbow Lake, which played a central role in the *Otter Tail* case. *United States* v. *Otter Tail Power and Light Co.*, 410 U.S. 366 (1973).

The number of fossil-fuel power plants operated by publicly owned electric utilities reported to the Federal Power Commission in 1971 was 363, which constituted a total installed capacity of 21,108,410 kilowatts.[1] It is anticipated that the installed capacity of these non-profit utilities will more than quadruple by 1990. In addition, some members are constructing, or are planning, nuclear generating units. Other members rely on wholesale purchases of power from other utilities. The court of appeals decision, therefore, has a direct effect on these public agencies.

All fossil-fuel power plants use water in their boilers, and, as is the case with nuclear plants, use water in their cooling operations. In many instances, the water is taken from "navigable waters," and, in some cases, water is taken from reaches of streams where the

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[1] FPC, STATISTICS OF PUBLICLY OWNED ELECTRIC UTILITIES—1971, Table 7, at XIV (1972).

regimen is affected by upstream government dams. The court of appeals deemed the latter to be use of "surplus water" from a government dam which requires a license from the Federal Power Commission pursuant to Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e). We believe the court's conclusion to be in error, and seriously detrimental to the interests of local publicly owned electric utilities.

ARGUMENT

The court of appeals said (App. 92-93):

> "In this age of pervasive federal regulation and of heightened awareness of environmental considerations, it is difficult to comprehend that there should be no federal agency or policy governing the siting and operations of fossil-fueled steam plants."

There is room for legitimate disagreement as to whether there should be such steam-plant legislation, or what it should say, or what agency should be charged with its administration. It seems clear that Congress did not resolve any of these questions 54 years ago when it enacted the Federal Water Power Act. Indeed, as the court said a few pages earlier (App. 90):

> "Steam plants were purposely omitted from the Congressional scheme and we cannot rewrite the statute to correct what may have been legislative shortsightedness."

And so, the court, in dismissing the complainants' arguments that thermal electric plants are "project works" under section 4(e), suggested that such argu-

ments "would be better addressed to the Congress" (App. 97). We agree.[2]

This logic would seem to apply to steam plants using water from government dams as fully as it does to steam plants using water from navigable streams. If new federal legislation is required to give the Federal Power Commission jurisdiction in the latter case (and we agree that it is), new federal legislation is logically required to give it jurisdiction in the former case, the court of appeals decision to the contrary notwithstanding.

We do not find in Part I of the Federal Power Act, enacted originally as the Federal Water Power Act, any criteria whatever to guide the Commission in licensing either class of steam plant, or its administration of such licenses once they were granted.

To name only a few problems suggested by the Act's provisions relating to hydroelectric projects: What would constitute the "project" and "project works," under Section 3, 16 U.S.C. § 796(11), (12)—the water diversion facilities or the whole generating plant? The

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[2] Congress has been considering, during the past several years, various legislative proposals which would extend federal regulatory jurisdiction over the siting of steam electric plants. Unlike Part I of the Federal Power Act, many of these bills are founded upon the principle that State governments should have a major role in the decision-making on siting. This principle would keep intact existing power plant legislation in many states. Some of the bills grant FPC authority as the responsible federal agency by adding a Part IV to the Act. The various views on siting can be found in: *Powerplant Siting and Environmental Protection, Hearings Before the Subcomm. on Communications and Power, House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. (1971). Examples of pending bills are: H.R. 180, H.R. 2374, H.R. 359, H.R. 4874, H.R. 5278, H.R. 13484, H.R. 13204, and S. 935.

power plant may be several miles from the stream. The Act's definitions of "project" and "project works" are wholly foreign to the components of a steam plant. Would the preference right of public agencies under Section 7 (19 U.S.C. § 800) apply? Would the preliminary permit provisions of Section 4 (e) (16 U.S.C. § 797(e)) and Section 5 (16 U.S.C. § 798) be applicable? What would be the duration of such a license? The Act specifies a period not exceeding 50 years (Sec. 6, 16 U.S.C. § 799), and this is the usual term related to the long life of hydroelectric projects. But the normal life of a thermal plant is of the order of 30 to 35 years. Would the plant be subject to recapture by the United States, as a hydroelectric facility is, at the end of the license period (Sec. 14, 16 U.S.C. § 807)? Could the licensee exercise the powers of eminent domain granted by the Act to licensees of hydroelectric projects (Sec. 21, 16 U.S.C. § 814)?

Any commission charged with the responsibility for licensing steam plants would need an entirely different set of statutory criteria and guidelines.

The decision below raises serious questions as to the States' licensing authority over steam plants located below government dams. Such authority is widely exercised. The Commission's licensing authority over hydroelectric projects is exclusive, in consequence of preemption by Congress in the Federal Power Act, of regulation of the use of navigable waters. If this preemption is deemed to extend to the licensing of steam plants (whether because they are using navigable waters or because they are using water supplied from government dams), presumably the States are ex-

cluded from the field that they now occupy. If so, the consequence is a vacuum, because, as noted earlier, there are no adequate criteria at all in the Federal Power Act to govern steam plant licensing.

As an organization concerned with effective power plant siting legislation, we believe that comprehensive legislation, not the silence of the Federal Power Act, on the subject of steam plants, is essential, and that the prospect of attaining that goal will be seriously handicapped if those not favorable to progress in this field are enabled to argue that this whole subject was fossilized, *sub silento,* a half-century ago, by legislation that made no mention of it.

CONCLUSION

For these reasons, we ask that the Court sustain the court of appeals holding on the "project works" clause of Section 4(e) of the Federal Power Act, and reverse that court's inconsistent holding on the surplus water clause of that section.

Respectfully submitted,

FRANK WILLIAM FRISK, JR.
Suite 212
2600 Virginia Ave., N.W.
Washington, D.C. 20037
Attorney for
American Public Power
Association

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